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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 518

THE ATLANTIC REFINING COMPANY,
CITIES SERVICE PRODUCTION COMPANY,
CONTINENTAL OIL COMPANY, AND
TIDEWATER OIL COMPANY,

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
LONG ISLAND LIGHTING COMPANY, AND
PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Petitioners, The Atlantic Refining Company, Cities Service Production Company, Continental Oil Company and Tidewater Oil Company (Producers), submit the following Reply to the briefs filed herein by Respondents[1] and by the Federal Power Commission (Commission) as *amicus curiae.*

[1] Public Service Commission of the State of New York (PSC), Long Island Lighting Company (Long Island) and Public Service Electric and Gas Company (Public Service) are collectively referred to herein as Respondents.

PRELIMINARY STATEMENT

Respondents argue that in a Section 7 certificate proceeding, the Commission must determine that the initial contract price satisfies rate criteria of Respondents' own making which, in effect, do nothing more than restate the Section 4 standard of "just and reasonable" without using the exact statutory phrase. Paradoxically, they steadfastly maintain that the Commission is not required to determine that the proposed initial rate is "just and reasonable" as a prerequisite to the issuance of certificates of public convenience and necessity. Respondents' insistence that they do not urge a determination of reasonableness in a certificate case — which creates a basic inconsistency in their argument — is an implicit recognition that this approach is administratively unworkable. Yet, no matter what words are used, such a determination is the necessary result of their argument.

As an alternative to having the Commission determine that the proposed initial rate is "just and reasonable", Respondents claim that the Commission should have attached rate reducing conditions to the certificates issued to the Producers. However, Respondents offered no evidence to support such a contention or to show that the proposed initial price was in any way excessive or unreasonable. In the final analysis it is apparent that this suggestion of Respondents is simply an attempt to substitute their judgment for that of the Commission with respect to the manner in which the public interest in reasonable rates should be protected.

The Commission's *amicus* brief is likewise inconsistent. It includes a complete answer to Respondents' contention that the June 24 order does not give adequate price protection to the consuming public. However, the Commission does not urge that the judgment below in this case should be reversed although it urges this court to disapprove of the main ground underlying such decision. This position can-

not be reconciled with the Commission's position in the court below and with the argument contained in the *amicus* brief relating to the proper function of the Commission in a Section 7 certificate proceeding. The Commission candidly admits it urges this anomalous result because the Producers have commenced service and allegedly are no longer free to withdraw their gas from interstate commerce (Br. 18). This is the only reason suggested by the Commission for affirming a decision which it admits is erroneous.

As recognized by both the Producers and the Respondents, and inferentially by the Commission's *amicus* brief,[2] the primary issue before this court for determination is the proper function of the Commission in a Section 7 certificate proceeding. In this case the fundamental issue narrows to a question of whether the June 24 order certificating the sales proposed by the Producers, subject to Section 5(a) rate investigations to determine the reasonableness of the proposed initial price, was a valid exercise of the administrative discretion vested in the Commission under Section 7 of the Act.

THE JUNE 24 ORDER EFFECTUATES THE CONGRESSIONAL PURPOSE TO HAVE INITIAL RATES ESTABLISHED BY THE CONTRACTING PARTIES

Respondents claim that the force of Section 4(a) requires the Commission to determine the reasonableness of the proposed initial rate in a Section 7 certificate proceeding. However, they are loath to embrace the logical consequences of this claim. For example, PSC states that (Br. 48):

> "Unless it is affirmatively established [in each and every Section 7 producer certificate proceeding] that the proposed sale *at such proposed initial price* is, in

[2] It is obvious that the Commission recognizes that the broad question as to the proper exercise of its certification authority to Section 7 is the basic issue which confronts the Court since over two-thirds of its brief is devoted to this question.

> all respects, reasonably in the public interest, the Commission is required by law either (1) to deny the application *in toto* or (2) to limit or condition the certificate to be issued upon reduction of the initial price to a level which the Commission has reason to believe will be without deleterious effect upon the interstate market, the interstate pipelines and, through them, the ultimate intrastate consumers."

Having contended that the Commission is duty bound to determine that the initial price is "reasonably in the public interest" and to deny certification unless it insures by condition that the initial price is reduced "to a level which the Commission has reason to believe will be without deleterious effect" (Br. 48), PCS elsewhere insists that it has "never claimed the Commission is required to determine 'just and reasonable' rates in certificate proceedings" (Supp. Br. 6). Thus, PSC would depart from the statutory standard and substitute criteria of its own making, by limiting its request "for initial-price conditions to levels which are merely nondisruptive," and which it defines as "hold-the-line prices". PSC's original brief in this case also discloses the error inherent in its assertion that every producer price in excess of the 17-18 cent level is due to the Commission's alleged failure to regulate initial prices properly (Br. 45). As shown therein, prices in the range of 20 cents per Mcf were being paid for gas reserves in Southern Louisiana long before the Commission exercised its jurisdiction over initial prices. *In the Matter of Gulf Interstate Gas Company*, Docket No. G-2058, Opinion No. 251, 15 F.P.C. 116 (1953).[3]

The arguments of Long Island and Public Service present the same dilemma. They say that "where the price proposed is not out of line there would be no need for lengthy hearings and extensive finding" (Br. 56). Without express reference to Section 4, they suggest that the Commission "take reasonable steps to safeguard the public interest in

[3] See PSC's Br. 23.

a just price," in issuing certificates under Section 7 (Br. 19). Similarly, using such terms as "the range of reasonableness" and "meaningful data bearing on the justness and reasonableness of the initial price" they again flirt with Section 4, saying (Br. 19):

> "The FPC has practical methods of accomplishing this whenever there is reason to believe that the proposed rate may not be within the range of reasonableness. It may require the producer applicant to present such meaningful data bearing on the justness and reasonableness of the initial price as could result in a valid finding in the §7 proceeding that the public interest requires the grant of the requested certificate at the proposed price. Or, if such data are not presented, it may employ some technique among the battery of techniques at its command to authorize the sale, and yet insure that the public will not be harmed until such time as the justness and reasonableness of the initial rate can eventually be determined."

Clearly, Respondents recognize the administrative chaos which would ensue from a requirement that a Section 4 determination of reasonableness be made in every Section 7 certificate proceeding.[4] However, equally clear is the fact that this is the inevitable result of the arguments which they present. Further, this is the very same vice which infects the decision below which would also require the Commission in a certificate proceeding to decide whether the initial contract rate is "just and reasonable" within the meaning of Section 4.[5]

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[4] PSC's Br. 50; Long Island's Br. 59.

[5] It is true that the court below denied "reaching this question" for it said:

> "While the Commission probably should always consider the impact of the proposed initial rate in its determination of public convenience and necessity, we do not reach the question of whether the Commission must fix the initial rate when its inquiry demonstrates that there is a substantial question of the reasonableness of that initial rate. See *Oklahoma Natural Gas Co.* v. *Federal Power Commission*, and the dissenting opinion of Judge Bazelon, D.C. Cir., 257 F. 2d 634, 642."

In the very next sentence, however, the court seeks to decide that question,

Thus, it is apparent that the main thrust of the argument presented by Respondents is to require the Commission in every Section 7 certificate proceeding either to determine that the proposed initial price is just and reasonable or arbitrarily condition the certificate to provide for some lower price. This argument completely ignores the congressional intent that rates should be established initially by the contracting parties and not by the Commission. Under the Natural Gas Act, initial prices are set in the "individualized arrangements" between private parties, and the public interest in reasonable rates is adequately protected by the Commission's review powers under Section 5(a) and the rate-changing procedures of Sections 4(d) and 4(e). This division between the initial rate-making powers of natural gas companies and the Commission's review function was clearly delineated in *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), where Mr. Justice Harlan, speaking for the Court, stated:

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as to this case, placing the Commission's independence and courage at stake if it should wish to differ, in event of remand, with this judicial evaluation of what is required by the record (R. 659):

> "In the cases before us, the Commission has left no doubt of the importance and *necessity* of a consideration of the *reasonableness* of the proposed initial rate" (italics supplied).

In view of the reference in the decision below to the dissent by Judge Bazelon in the *Oklahoma Natural* case, it is interesting to note that he misread the Commission's *Signal* decision [*Re Cities Service Gas Company, et al.*, 12 PUR 3d3 (1955)] as holding "that the justness and reasonableness of the rate is a vital element in a [certificate] showing 'that the service proposed is or will be required by the present or future public convenience and necessity'" (258 F. 2d at 650). This is exactly the same mistake made by the court below (R. 658). But the Commission in *Signal* made it plain that it was not determining the *reasonableness* in that case, saying (12 PUR 3d at 16):

> "We wish clearly to state that in conditioning the order to follow to provide for a rate of 10 cents per Mcf, we do not find that this rate is the just and reasonable rate within the meaning of Section 4 of the Act."

The Commission reemphasized its position in denying rehearing, saying (15 F.P.C. at 1021):

> "We do not hold that the issue of rates in a certificate proceeding is identical in scope and effect with that in a section 4 and section 5 proceeding. The rate we deem proper to be charged if a certificate should issue is not necessarily the same we could find to be the lowest reasonable rate under Section 5. Criteria for prescribing a rate necessarily differ from criteria for proscribing a rate."

"In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts. In this respect, the Act is in marked contrast to the Interstate Commerce Act, which in effect precludes private rate agreements by its requirement that the rates to all shippers be uniform, a requirement which made unnecessary any provision for filing contracts. • • • Recognizing the need these circumstances create for individualized arrangements between natural gas companies and distributors, the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public."

• • •

"• • • Moreover, the very premise that Sections 4(d) and (e) and 5(a) are alternative rate-changing 'procedures' is itself based on a misconception of the structure of the Act. These sections are simply parts of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful. The Act merely defines the review powers of the Commission and imposes such duties on natural gas companies as are necessary to effectuate those powers; it purports neither to grant nor to define the initial rate-setting powers of natural gas companies."

• • •

"• • • In short, the Act provides no 'procedure' either for making or changing rates; it provides only for *notice* to the Commission of the rates established by natural gas companies and for *review* by the Commission of those rates. The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act.

"All of the relevant provisions of the Act can thus be fully explained as simply as defining and implementing the powers of the Commission to review rates set initially by natural gas companies, and there is nothing to indicate that they were intended to do more. Admittedly, the Act presumes a capacity in natural gas companies to make rates in contracts and to change them from time to time, but nowhere in the Act is either power defined. The obvious implication is that, except as specifically limited by the Act, the Rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act: * * *"

See also *United Gas Pipe Lines Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103, 111-114 (1958); *Phillips Petroleum Co.* v. *FPC*, 258 F. 2d 906, 917 (10th Cir., 1958). In other words, private contracts have an important function in the statutory scheme of regulation provided in the Natural Gas Act — by means of such contracts, the relations between the contracting parties, including the initial price, are established subject to the continuing supervision of the Commission.

The congressional intent to vest the initial rate-making function in private parties is further shown by the fact that under the Natural Gas Act the Commission does not have the authority to suspend initial rates.[6] By way of contrast, the Motor Carrier Act,[7] which served as a proto-type for the Natural Gas Act, empowers the Interstate Commerce Commission to suspend initial motor carrier rates and thereafter to determine the initial rate.

By establishing a statutory scheme of regulation whereby initial rates are set by private contracts, Congress has given the producers of natural gas the incentive required to explore for and develop the natural gas reserves neces-

[6] The suspension power given the Commission in Section 4(e) applies only to rate changes filed under Section 4(d) and does not apply to initial rates.
[7] 49 U.S.C. 301, et seq.

sary to satisfy the demands of the consuming public. If the producers were deprived of their initial rate making powers, their incentive to undertake the requisite exploration would be greatly diminished and the inevitable result would be a dimunition in the quantities of natural gas available — a result detrimental to the public interest.

Further, Congress necessarily realized that the interstate market would be in direct competition with the intrastate market for the available supplies of natural gas.[8] If initial prices for the sale of natural gas in interstate Commerce were established by the Commission, then the Producers would undoubtedly divert more and more of their gas to the intrastate market where they could be assured of receiving the initial prices provided for in their contracts. Obviously, Congress did not intend that the interstate market should be at a serious disadvantage in competing with the intrastate market, and, therefore, it created a statutory scheme whereby the contracting parties are permitted to establish the initial rate for the sale of their gas subject to the Commission's rate review powers in Section 4 and 5 of the Act. This congressional policy permitting initial prices to be established by the contracting parties also recognizes the administrative impossibility of requiring a determination in certificate proceedings that every initial rate is "just and reasonable." Such a determination can only be made by reviewing the entire operations of a producer and is therefore appropriate for a Section 5(a) proceeding wherein the Commission reviews company-wide operations and not for a Section 7 certificate proceeding which only involves a single sale, generally a small fraction of the producer's total production.

[8] Intrastate consumption of gas in Louisiana in 1957 amounted to 42.3% of the total production of that state; in Texas, the intrastate consumption amounted to 51.5% of the total production for 1957; and in Oklahoma, the intrastate market consumed an amount of gas equal to 68.4% of the total production of that state. (Bureau of Mines Mineral Market Report, MMS, 283-1957).

If it were administratively feasible — which it clearly is not — many producers would like to have a determination at the time of certification whether their initial contract rates were "just and reasonable." If such determination could be made at the outset, then the producers could reject the certificate offered to them if they did not like the price, or accept if they were satisfied with the Commission-determined price. The obvious result of such a practice would be that the producers would commit only their high price gas to the interstate market; the low price gas would be diverted to the intrastate market. In the final analysis, the consuming public would pay far more for natural gas than it does under the existing statutory framework whereby prices are established initially by the contracting parties. Thus, it is clear that there are substantial reasons behind the legislative policy that the Commission should review — not make — initial rates.

The first two orders in this case were nothing more than arbitrary attempts by the Commission to exercise initial rate-making powers. The order of April 22, 1957, issued temporary certificates to the Producers but remanded the proceedings to the Presiding Examiner for a determination "at what rate the public convenience and necessity" requires the sales to be made (R. 519, 523-523). This was an obvious attempt by the Commission to determine the initial rate. The order of May 20, 1957, likewise attempted to fix the initial rate by conditioning the permanent certificates issued to the Producers so as to reduce the initial rates from 21.4¢ per Mcf to 17¢ per Mcf (R. 528, 530). The May 20 order further provided that the Producers would be allowed to collect the contract price of 21.4¢, subject to refund, after the 17¢ price had been effective for one day (R. 528-529). In other words, what the Commission attempted to do by its May 20 order was to suspend an initial rate, an act for which

there is no statutory authority.[9] The Commission's orders of April 22 and May 20 usurp the initial rate-setting powers vested in private parties under the Natural Gas Act — a result diametrically contrary to this Court's analysis of the Act in *Mobile, supra.* Only in the June 24 order did the Commission properly exercise its review function with respect to the initial rate established by the Producers in their contracts. By certificating the proposed sales and instituting Sections 5(a) investigations, the Commission permitted "the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public" (350 U.S. 339).. Since the June 24 order is supported by substantial evidence, it should be affirmed on this appeal.

THE PRODUCERS' DECISION TO EXERCISE THEIR CONTRACTUAL AND STATUTORY RIGHTS COULD NOT AND DID NOT PREVENT THE COMMISSION FROM CONSIDERING ALL FACTORS BEARING ON THE PUBLIC CONVENIENCE AND NECESSITY.

No matter how Respondents attempt to hide the fact, it is clear that the court below predicated its decision upon a determination that the Producers' so called "threats" deprived the Commission of its statutory jurisdiction to consider the Producers' certificate applications. In so concluding, the court below erred, for it is obvious that in refusing to accept the certificates tendered in the May 20 order, the Producers were merely exercising their undeniable contractual and statutory rights. Their refusal to accept the

[9] The Commission admits in its *amicus* brief that it does not possess the power to suspend initial rates. See Br. 37-38. The Commission's position is consistent with its rules and regulations which provide that an initial rate schedule "cannot be suspended" by exercise of the powers conferred on the Commission by the Act. 18 C.F.R. 2.4(d).

conditional certificates offered by the Commission's May 20 order could not and did not deprive the Commission of authority to reconsider all of the facets comprising the public convenience and necessity and then issue the June 24 order. No additional evidence was necessary to justify such reconsideration for Section 19(a) authorizes the Commission to "grant or deny rehearing or to abrogate or modify its order without further hearing";[10] and the fact that its final order contained findings inconsistent with those made in prior orders is of no consequence. *Virginia Ry. Co.* v. *U.S.*, 272 U.S. 658, 665-666 (1926).

The Producers' decision not to accept the certificates tendered in the May 20 order was predicated on that clause in each of their contracts which provided (R. 287-288):

> "2. Certificates of public convenience and necessity and construction of facilities:
>
> "(a) Each of the parties hereto will file with the Federal Power Commission and other regulatory bodies having jurisdiction, necessary application, if any, for certificates of public convenience and necessity satisfactory to the applicant without delay following the execution hereof. Such application, if any, will be prosecuted diligently to the end that, if issued, such certificates will be issued on or before April 1, 1957. *In the event any of such applications are denied, or if satisfactory certificates have not been issued by April 1, 1957, either party hereto may, by written notice mailed to the other party herto, terminate this contract in its entirety,* and if either such party so terminates this contract, then the respective obligations of the parties to sell and buy gas hereunder shall be of no force and effect from the date of such termination." (Emphasis supplied.)

Similar clauses are customary in gas sales contracts submitted to the Commission in certificate proceedings. The

[10] 52 Stat. 821 (1938), 15 U.S.C. 717r (a) (1952).

Producers here requested certificates in accordance with their contracts; it was then incumbent upon the Commission to review such proposals, and, if the Commission issued certificates, the Producers were free to accept or reject them. The freedom of a certificate applicant to reject a proffered certificate is a logical concomitant of this Court's opinion in *Mobile*,[11] for in no other way can privately negotiated contracts initially establish the relations between the parties. In effect, Respondents have set up a straw man of "threats" which have no existence in the facts of this case. The Commission recently disposed of a similar attack in the *Matter of Transcontinental Gas Pipe Line Corp.*, Docket Nos. G-13143, et al, Opinion 315, 20 F.P.C. 264 (1958), stating (20 F.P.C. at 283):

> "As to claimed producer threats, there are no such threats in this case. Various producers have reserved the right to terminate their contracts of sale with Transco if the seller does not obtain a satisfactory certificate. We do not consider such reservations to be any limitation upon our right of inquiry into proposed rates set forth in the several producer contracts. It must be recognized, however, that this Commission cannot force a producer to accept a certificate if it does not desire to, any more than we can force New York Natural to accept a certificate and transfer the properties involved in the proposed storage project previously discussed. Despite this, we do not here nor have we ever foregone consideration of price in the formulation of our judgment of where the public convenience and necessity lies. Where the possibility of the nonacceptance of a certificate exists, we think the proper course is the same followed in every certificate case — to consider the competing factors, evaluate the alternatives, and decide as the public convenience and necessity requires."

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[11] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

While loosely misusing the "threat" label, Respondents admit that the Producers were authorized to withdraw their certificate applications and cancel their contracts.[12] Having admitted that the Producers had the undeniable legal right to commit or decline to commit their reserves to interstate service under a proffered certificate, it is evident that the Respondents have continued to use the term "threat" to suggest that, by the exercise of such contractual rights, the Producers had required the Commission to forego consideration of one of the elements necessary to the formulation of its judgment — the proposed initial price. However, as is disclosed by a cursory examination of the June 24 order, the Producers' decision to exercise their contractual right of cancellation could not and did not limit the Commission's inquiry into the issue of price and all of the other factors comprising "public convenience and necessity."[13] Respondents' use of the term "threat" was born of advocacy and is completely without factual heritage. Indeed, PSC repeatedly attempts to capitalize on this constructed "threat", but then devotes more than two pages of its brief to demonstrate that there is not a "scintilla of proof" of the "threat" it seeks to exploit (Br. 54-55).

The Producers' rejection of the May 20 certificates was justified by another consideration. That order contains a condition reducing the initial contract price from 21.4¢

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[12] Long Island and Public Service state that it is an "undeniable proposition that an applicant need not accept a certificate unsatisfactory to it" (Br. 26, fn. 29). PSC makes a similar concession (Br. 53, 65). See also the Commission's *amicus* brief (Br. 20-22).

[13] The June 24 order states (R. 487):

> " * * * Important as is the issue of price * * * as far as the public is concerned, the precise charge that is made initially is less important than the assurance of this great supply of gas. * * * By virtue of the authority conferred upon us by Sections 4 and 5 of the Natural Gas Act * * * we are of the opinion that we will be able to adequately protect the public interest with respect to the matter of price."

When this plain language is considered in conjunction with the dissent by Commissioner Connole, it is evident that the June 24 decision was reached only after very careful consideration of the element of price.

to an arbitrary level of 17¢ per Mcf. Any condition under Section 7(e) must be reasonable and must have a rational basis in the record before the Commission. As stated by the Commission *In the Matters of Transcontinental Gas Pipe Line Corp., supra:*

> "Furthermore, if a rate condition is to be imposed, there must be some evidence showing to establish what the new rate should be. It is not sufficient to select arbitrarily or at random some price a few cents lower than that proposed by the producer. The new price must be arrived at on the basis of facts, in the application of some rational criterion, if the condition imposing it is to be found 'reasonable' as Section 7(e) requires. No such facts or criterion are present in this case."

Here there is absolutely no record evidence to support the 17¢ price condition in the May 20 order. Respondents introduced no evidence whatsoever to support a rate condition, but made conflicting suggestions as to the price level which should be imposed by the Commission (R. 378, 389, 394). For example, PSC suggested that the Commission impose a 15.4¢ price condition (R. 389) while Public Service suggested a rate condition "which would require that the proposed sales be made at such lower price which would protect the interest of the consumers" (R. 394). The fact that 17¢ was the highest price previously paid by Tennessee cannot form the basis for such rate condition, for the uncontroverted evidence shows that the proposed sales are not in any of Tennessee's Louisiana pricing districts and are in an entirely new area where there are no other sales and therefore no possible disruption of an existing price structure (R. 43-44). The only 17¢ contract referred to was a purchase that was made some 200 miles from the area involved in this case, and that price had not been appraised by the Commission, nor is there any evidence showing comparability to the sales in question (R. 351). Nor was the

17¢ price in any way related to the Producers' costs. Moreover, other pipelines were paying prices equal to or in excess of 20¢ per Mcf for smaller onshore reserves with less future potential[14] (R. 351). The fundamental error in the May 20 order is summarized by the Commission's *amicus* brief as follows (p. 94):

> "The 17¢ per Mcf price which the Commission originally sought to have the Producers accept in this proceeding (R. 528, 529) was probably subject to this defect. Although this was the highest price which Tennessee Gas was then paying, the Commission had no way of determining whether that price was at all an appropriate rate for the Catco sale, so that the justification for requiring the parties to substitute that price for the contract price of 21.4¢ per Mcf, even for a limited period of time, would be obscure."

Thus, the Commission concedes that its May 20 order was erroneous, further justifying the rejection of such certificates by the Producers.

The fundamental misconception as to the Commission's statutory jurisdiction underlying the decision of the court below is compounded by the fact that the objection was raised, *sua sponte,* in contravention of Section 19(b) of the Natural Gas Act. Both before the Commission and the court below, Respondent's objections were aimed solely at the question of price and directed to an alleged abuse of discretion by the Commission in refusing to condition the certificates issued to the Producers on June 24. Respondents' belated attempts to "stretch" their objections to cover the question of the court below as to the jurisdiction of the Commission rest upon a strained and unsupported construction of the word "jurisdiction" and clearly violate the intent

[14] The Producers' wells are located 15-25 miles offshore the coast of Louisiana in the Gulf of Mexico in water as deep as 90 feet (R. 520).

of Section 19(b) which precludes the urging of objections on review which were not presented to the administrative body for consideration.

Thus, it is apparent that the decision by the court below reversing the June 24 order because of its view that the so-called "threats" of the Producers deprived the Commission of jurisdiction is substantively and procedurally erroneous.

TENNESSEE'S NEED FOR THE GAS IS UNCONTROVERTED AND IS ESTABLISHED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

Another facet of Respondents' attack on the June 24 order is their suggestion that the record evidence does not support Tennessee's need for the Producers' gas, although they do not challenge the actual existence of the need as such.[15]

The evidence in this record firmly establishes a *prima facie* case as to Tennessee's need for this gas. The very fact that Tennessee, with its demonstrated experience in purchasing gas for its constantly expanding system, had contracted to purchase this gas reserve and obligated itself to take or pay for a tremendous daily quantity from this reserve confirms the need for the Producers' gas (R. 490). Thus, the contracts themselves are a sufficient answer to Respondents' criticism. Further, the Commission knew that Tennessee had an application pending for authority to construct and operate facilities which would increase its average daily system capacity over 300,000 Mcf of gas per day in

[15] PSC's brief (p. 2) refers to the "phenomenal" demand for natural gas over the five years since this Court's decision in *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U.S. 672 (1954). PSC hedges its argument with respect to Tennessee's need for Producers' gas by stating that there was no proof of need *at the price* (Br. 56-59, Supp. Br. 19-20). However, its argument evaporates with its admission that "there is a continuing need for gas at reasonable prices" (Br. 56). This is clearly an admission that there is a "need" for the gas, leaving for decision the question of price, which is actually the focal point of Respondents' argument.

order to satisfy the requirements of its existing customers.[16] This application involved the construction of over 1,000 miles of additional pipeline and the installation of over 120,000 horsepower at an estimated cost of approximately $175,000,000.[17] The gas reserves involved herein were an integral part of the total reserves relied upon by Tennessee to support this application, which also included a request for authority to supply a portion of the large unsatisfied demand for gas in the Chicago area. As to this aspect of Tennessee's proposed service, evidence had been introduced in another proceeding showing that there were 260,000 house heating customers awaiting service in that area.[18] These were certainly facts which the Commission was entitled to consider in determining Tennesse's need for this gas.

Because of its familiarity with the tremendous growth in the consumption of natural gas and with the present and future needs of the customers of Tennessee, the Commission was well qualified to appraise this evidence of Tennessee's need for the Producers' gas. The demand of Tennessee's customers for additional gas was a primary consideration which the Commission could not ignore. See *City of Pittsburgh* v. *FPC*, 237 F. 2d 741 (D.C. Cir., 1956).

As noted by the Presiding Examiner, the *prima facie* case as to Tennessee's need for this gas was unchallenged and uncontroverted.[19] The Examiner issued certificates to

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[16] Docket No. G-11107. Of over 80 customers served by Tennessee, only four intervened in this proceeding. Of these four it is significant that Long Island and Public Service are the only two customers of Tennessee who did not seek additional supplies from Tennessee in Docket No. G-11107.

[17] *In Re Tennessee Transmission Co.*, 17 F.P.C. 461, 469 (1957).

[18] *In the Matter of Natural Gas Pipe Line Company of America*, 16 F.P.C. 80 (1956). See Long Island and Public Service Br. 41.

[19] The Examiner stated (R. 755, 760):

> "* * * None of the interveners made any substantial contention that the acquisition of these reserves by Tennessee were improvident or useless or were other than favorable to the interests of the public served by Tennessee's system. In fact, the only objection by interveners to the granting of a certificate to these applicants is to the price at which these reserves were acquired by Tennessee.
>
> "The facts of this proceeding indicate that these reserves are important to Tennessee's expansion and it is known that the demands for natural gas is almost everywhere in excess of that available from pipeline systems."

the Producers subject to the issuance of a certificate to Tennessee for the construction of the necessary facilities to take the gas from Producers. This qualification was imposed by the Examiner not because of any doubt as to the need for the gas but so that his decision could not conflict with the determinations in Docket No. G-11107 involving Tennessee's application for the necessary facilities.

The Commission's order of April 22, 1957, expressly adopted the Examiner's finding as to Tennessee's need for this gas without the qualifying condition (R. 836):

> "The Examiner has found that there is a need for those volumes of gas on the system of Tennessee Gas, and that the applicants are ready and able to deliver them and take them, respectively. These findings we adopt. They argue conclusively that the sale is necessary in the public interest."

On the same day, as noted in its April 22 order, the Commission issued a temporary certificate to Tennessee in Docket G-11107 to construct the 107 miles of gathering line to bring the gas here involved to Tennessee's system at Kinder, Louisiana (R. 522).

The Commission's May 20 order adhered to the same view of the need for this gas (R. 904):

> "In view of the need for the volumes of gas and the exigencies of the construction schedule to which we averted in our previous order, we are disposed to modify our order of April 22, 1957, and to grant a permanent certificate to Catco * * * ."

The Commission's final order of June 24, 1957, also recognized the need for this gas, stating (R. 925):

> " * * * We are moved by the primary consideration that the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas. Further, it appears to us, important as is the issue

> of price, that as far as the public is concerned, the precise charge that is made initially is less important than the assurance of this great supply of gas. • • • We are of the opinion that, in the circumstances of this case, in view of the great demand for gas by customers of Tennessee Gas, the price consideration should not be made the prime determinant of what the public convenience and necessity require."

Thus, it is evident that the Commission consistently recognized Tennessee's need for this gas despite Respondents' inferences that it was a unique factor in the June 24 order.

Respondents' real motivation in challenging the findings as to Tennessee's need for this gas is disclosed by the fact that they did not apply for rehearing of the April 22 and May 20 orders which granted certificates to the Producers. If Respondents were actually challenging the granting of certificates to the Producers on the question of need, they were required to apply for rehearing of these prior orders. Section 19(a) of the Act; *FPC* v. *Colorado Interstate Gas Co.*, 348 U.S. 492 (1955). So long as Respondents contend that the May 20 order was proper, they necessarily concede that a need for the gas exists.[20]

Tennessee's need for the Producers' gas is established by the uncontroverted evidence of record. Such need was a proper factor for the Commission to consider in weighing all of the elements comprising the public convenience and necessity. Respondents' contention that the Commission's June 24 order dispensed with consideration of the initial price is patently erroneous. Even a cursory examination of the June 24 order discloses that the Commission carefully considered the initial price and, after evaluating *all* the various factors which make up the public covenience and necessity, determined that it was in the public interest to

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[20] The brief of Long Island and Public Service characterizes the May 20 order as "this fair solution" (Br. 20) and "the fair second order" (Br. 27). This is consistent with their statements in the court below that the May 20 order was a "wise decision" and "showed careful consideration of the public interest."

certificate the proposed sales subject to Section 5(a) rate investigations. Clearly, Respondents' real complaint is not that the Commission subordinated price considerations to Tennessee's need for the gas, but that the Commission failed to make price the *sole* determinant of the public convenience and necessity.

Gas is an exhaustible natural resource. The economic value and life of a pipeline are directly measurable by the size of the supporting reserves. It is probably a matter of common knowledge that no pipeline ever has enough reserves; it is certainly within the administrative expertise of the Commission whether there is a need for additional reserves to improve the reserve life index of a particular pipeline. Hence, even if there were no record evidence as to Tennessee's need for this gas — a point unchallenged during the proceedings — the Commission's conclusion on the question of need would still come within its competence.

THE COMMISSION'S AMICUS CURIAE BRIEF — A CORRECT ANALYSIS OF THE APPLICABLE LAW WITH AN INCONGRUOUS RESULT.

The *amicus curiae* brief filed herein on behalf of the Federal Power Commission is a complete anomaly. The brief contains a thorough, lucid and accurate statement of the Commission's function in a Section 7 certificate proceeding which conclusively demonstrates that the June 24 order was a proper exercise of the Commission's administrative discretion. However, the Commission does not urge reversal of the decision below, although it states that the principles underlying such decision "are clearly incorrect and must be disapproved." The inconsistency between the argument presented and the result urged is compounded by the Commission's view that the decision below requires reimposition of the May 20 order (Br. 18) which the Commission admits is erroneous (Br. 94). The Producers do not agree with the Commission that this is the effect of the Third Circuit's judgment, but they are completely baffled

by the Commission's retreat from the June 24 order which it fought so hard to preserve in the court below in favor of the May 20 order which the Commission now states is defective.

This paradox cannot be clearly explained. However, it should be noted that in the court below the Commission filed a petition for rehearing which strongly supported the June 24 order, a position directly contrary to that espoused in the *amicus* brief filed in this Court. After stating its changed and curious position, the Commission then devotes the next seventy-two pages of its brief to the development of principles which, if applied here, would require affirmance of the June 24 order. This is particularly true of Point V. (Br. 81-106), where the Commission spells out a point-for-point defense of its treatment of the price problem in producer certificate cases. Without exception, each of these points necessitates reversal of the decision below and affirmance of the June 24 order.

The Commission frankly admits that it has reversed its position only because the Producers have commenced service. (Br. 18).[21] In effect the Commission would apply a double standard in producer certificate cases, whereby its determination as to the public convenience and necessity is primarily resolved with reference as to whether or not a producer is bound to accept whatever certificate is issued to him. Evidently if the Producers herein had refused to commence deliveries under the certificates issued them in June 24 order until the final decision in this case, the Commission would now be urging this Court to reverse the decision below.

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[21] The Producers do not wish to inject into this case any discussion as to the effect to the commencement of service by them under the June 24 order. Any question as to the Producers' right to discontinue such service if the June 24 order is reversed is premature. There is no substance to the impression conveyed by the Commission's brief that it is well established that having commenced the sale under authority of the June 24 order, the Producers cannot "lawfully abandon" that service except with permission of the Commission under Section 7(b). Prior to the filing of its petition for rehearing in this case in the court below, the Commission had, so far as the Producers can determine, never before taken that position in any order, decision, or even in legal documents filed by its counsel.

The Commission's brief states that this is not now a case of general importance since it allegedly rests on the particular facts and circumstances surrounding the proposed sales (Br. 18). Therefore, the Commission urges this Court to defer consideration of the fundamental issues raised on this appeal until such issues are presented in *United Gas Improvement Company* v. *FPC*, No. 12797 and *Service Commission of New York* v. *FPC*, No. 12805, now pending in the Third Circuit Court of Appeals. Although the Commission alleges that the record in this case is of an "atypical character," it does not point out a single factual difference or in any way distinguish the present case, except that it states that this Court need not concern itself with the basic issues presented in this case because the Producers have commenced service and therefore allegedly are no longer free to refuse to sell their gas and to reject a permanent certificate. Most assuredly, the fact that the Commission believes that the Producers are now "trapped" has no effect on the merits of their appeal or on the significance of the issues raised by such appeal. In fact, this one distinguishing feature between the present case and those two now pending in the Third Circuit has been removed, for the certificate applicants in those two cases have likewise commenced service.

Aside from these differences, the Producers are in full agreement with the arguments presented in the Commission's *amicus curia* brief as to the proper function of the Commission under Section 7 of the Natural Gas Act.

CONCLUSION

Whatever legal pathway is here followed by Respondents, it inevitably leads to one conclusion — they are dissatisfied with the manner in which the Commission has determined public convenience and necessity in Section 7 certificate proceedings. In the present case, Respondents are displeased by the Commission's determination that the pub-

lic interest in reasonable rates will be adequately protected by Section 5(a) proceedings. Respondents insist that such protection could be provided only by the imposition of an arbitrary price condition. When stripped of the verbal camouflage which surrounds them, these arguments are revealed as nothing more than an attempt to have this Court substitute its judgment for the administrative discretion of the Commission with respect to the consideration to be given the initial price in determining public convenience and necessity in a Section 7 certificate proceeding. The error inherent in the application of such argument to the present case is apparent, for it is fundamental that where an administrative agency has a choice of remedies and selects one, that choice will not be set aside merely because another remedy might have been more appropriate. *General Protective Com.* v. *SEC*, 346 U.S. 521 (1954); *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702 (1944). Further, when Congress has entrusted an administrative agency with the responsibility for selecting or determining the means of achieving a statutory policy, the relation of remedy to policy is peculiarly a matter for administrative competence. *General Protective Com.* v. *SEC, supra; American Power and Light Co.* v. *SEC*, 329 U.S. 90 (1946); *Halstead* v. *SEC*, 182 F. 2d 660 (D.C. Cir., 1950).

In effect, Respondents attempt to emasculate the administrative discretion entrusted to the Commission by the Natural Gas Act and to destroy the initial rate setting powers of private parties as delineated by this Court in *Mobile, supra*. Respondents would require the Commission to determine public convenience and necessity in a manner which not only violates these fundamental concepts but is administratively unworkable and will inevitably curtail the supplies of natural gas committed to the interstate market to the detriment of the consuming public.

For the additional reasons urged herein, the Producers respectfully submit that the decision of the court below should be reversed and that the Commission's June 24 order should be affirmed.

Respectfully submitted,

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